No. 71-1178

IN THE

Supreme Court of the United States

October Term 1971

GULF STATES UTILITIES COMPANY,
Petitioners,

v.

FEDERAL POWER COMMISSION
CITY OF LAFAYETTE, LOUISIANA
CITY OF PLAQUEMINE, LOUISIANA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE CITIES OF LAFAYETTE AND PLAQUEMINE, LOUISIANA, IN OPPOSITION

GEORGE SPIEGEL
ROBERT C. McDIARMID
Suite 312
2600 Virginia Avenue, N. W.
Washington, D. C. 20037

Counsel for Respondent Cities of Lafayette and Plaquemine, Louisiana

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Section 204 of the Federal Power Act, 16 U.S.C. 824 (Pet. 47a - 49a)[1/] provides that, with certain exceptions not here relevant, no public utility shall issue any security unless authorized to do so by the Federal Power Commission, which shall make such authorization only if, *inter alia*, it finds that the issue "is for some lawful object . . . compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the applicant of service as a public utility . . . . "

[1/] "Pet." references are to the petition for Certiorari. "R" references are to the Joint Appendix filed in the court below.

Section 204(b) of that Act provides that the Federal Power Commission may act, "after opportunity for hearing" to grant any application in whole or in part, with such modification and upon such terms and conditions as it may find necessary or appropriate, and may from time to time after opportunity for hearing and upon good cause, make supplemental orders which may "modify the provisions of any previous order as to the particular purposes, uses, and extent to which or the conditions under which, any security so theretofore authorized or the proceeds thereof may be applied . . . . " Section 204 (c) of that Act specifies that no proceeds of a security issue authorized by the Federal Power Commission shall be spent for any purpose not specified in the Commission's order.

Petitioner, Gulf States Utilities Company ("Gulf States") sought the authorization of the Federal Power Commission under Section 204 of the Federal Power Act for the issuance of bonds, the proceeds of which would be used to pay off a part of the Company's short term indebtedness.[2/] Respondents, the Cities of Lafayette and Plaquemine, Louisiana ("Cities") filed a protest and petition to intervene before the Federal Power Commission, charging that the funds authorized would be used in the course or furtherance of a conspiracy among Gulf States and two other electric utilities to monopolize the wholesale or bulk supply of electric energy in Louisiana, in violation of the antitrust laws and policies of the United States, and thus for objects which were neither lawful, compatible with the public interest, nor necessary or appropriate for the proper performance by Gulf States of service as a public utility.[3/] The Federal Power Commission, without hearing, granted the authorization sought by Gulf States (Pet. 32a - 37a), and thereafter denied rehearing (Pet. 41a - 42a).

[2/] Gulf States and the Commission have taken the position that the reduction of short term indebtedness by refinancing would free for further use without new authorization that much of the Gulf States' previous short term financing authorization as is so released by refinancing.

[3/] The Cities Protest and Petition to Intervene is set out in full at R 54-160

The reversal of this action of the Federal Power Commission by the Court of Appeals of the District of Columbia Circuit (Pet. 1a - 29a) was clearly correct, and the petition for certiorari raises no issues of substance appropriate for resolution at this time.

1. Petitioners contend (Pet. 5 - 10) that because the Federal Power Commission is not delegated responsibility by Section 11 of the Clayton Act, 15 U.S.C. 21, to enforce that Act, it must ignore violations of the Sherman and Clayton Acts when it determines whether the proposed use of funds "is for some lawful object . . . compatible with the public interest . . . ." under Section 204. The short answer is that Section 204 of the Federal Power Act is simply not susceptible to such a narrow reading. Moreover, as this Court held in *Denver and Rio Grande Western R. v. United States*, 387 U.S. 485, 492-493 (1967), interpreting a statute after which Section 204 was modeled, the term "public interest" is to be read "broadly, to require consideration of all important consequences including anticompetitive effects." See also, e.g., *California v. FPC*, 369 U.S. 482 (1962); *FMC v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238 (1968); *Municipal Electric Association of Massachusetts v. SEC*, 413 F.2d 1052 (D.C. Cir. 1969); *Marine Space Enclosures v. FMC*, 420 F.2d 571 (D.C. Cir. 1969); *Northern Natural Gas Company v. FPC*, 399 F.2d 953 (D.C. Cir. 1968), none of which involve agencies given specific enforcement functions by Section 11 of the Clayton Act.

2. Petitioners contend (Pet. 10) that there is no support in logic or policy for interpreting Section 7 of the Public Utility Holding Company Act, 15 U.S.C. 79g, differently from Section 204 of the Federal Power Act. The Cities consider that there are inconsistencies between the interpretations of the two acts by the court below, and if certiorari is granted, reserve the right to argue that both statutes require review by the agencies of anticompetitive consequences of the authorization. That does not warrant the grant of certiorari at the present time, however.

3. Petitioners contend (Pet. 10 - 12) that the court below erred in setting aside a decision of the Federal Power Commission supported by "substantial evidence". The *only* evidence in the record before the Federal Power Commission was the application of Petitioners, since the Federal Power Commission approved the issuance of the bonds without giving the Cities the statutorily required opportunity for a hearing. To the extent that the Federal Power Commission's order might have been thought to rest upon a contention that a mere change in form from short to long term debt was not relevant, that contention was in effect abandoned when the Commission conceded that (as noted by the court below, Pet. 20a) the issuance of $30 million in bonds would free an additional $30 million in short term note authorization.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

GEORGE SPIEGEL
ROBERT C. McDIARMID
2600 Virginia Avenue, N.W.
Washington, D. C. 20037

April, 1972